No. 85-1733

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN CHARLES McANINCH, EXECUTOR OF THE ESTATE OF JOHN W. McANINCH; GEORGE DROEGE; MRS. CHESTER THOMPSON AND JERALD A. THOMPSON d b a THOMPSON & SONS; DON J. GATENS; JOHN V. HANSEN; KENDALL ODEN; PAUL BETTIN; EARL GALLOWAY; JAMES R. MIKSCH; RALPH DEBRUIN; ED CRALL; FRANK DIRKS; FRED OLSON; ORVAL L. MILLER; FRANK RHODENBAUGH AND ALBIA SALES COMPANY, INC., *Petitioners*, against

TRADERS NATIONAL BANK OF KANSAS CITY, *Respondent.*

JOHN CHARLES McANINCH, EXECUTOR OF THE ESTATE OF JOHN W. McANINCH; DON J. GATENS; JOHN V. HANSEN; KENDALL ODEN; PAUL BETTIN; EARL GALLOWAY; JAMES R. MIKSCH; RALPH DEBRUIN; ED CRALL; FRANK DIRKS; FRED OLSON; FRANK RHODENBAUGH; AND ALBIA SALES COMPANY, INC., *Petitioners,*

vs.

JOHN H. KREAMER, WILLIAM L. TURNER, GAGE & TUCKER; WAYNE H. HOECKER; GEORGE COUGHLIN; THOMAS J. GUILFOIL; AND GENERAL BANCSHARES CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Has the Federal Court departed from governing Erie Doctrine principle and improperly applied Missouri malicious prosecution law to the facts of the underlying case and thus allowed banks and the attorneys representing them to pursue highly questionable claims against innocent parties with impunity.

PARTIES

All parties to the proceeding in the United States District Court, Western District of Missouri and the United States Court of Appeals for the Eighth Circuit are listed in the caption.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN CHARLES McANINCH, EXECUTOR OF THE ESTATE OF JOHN W. McANINCH; GEORGE DROEGE; MRS. CHESTER THOMPSON AND JERALD A. THOMPSON d/b/a THOMPSON & SONS; DON J. GATENS; JOHN V. HANSEN; KENDALL ODEN; PAUL BETTIN; EARL GALLOWAY; JAMES R. MIKSCH; RALPH DEBRUIN; ED CRALL; FRANK DIRKS; FRED OLSON; ORVAL L. MILLER; FRANK RHODENBAUGH AND ALBIA SALES COMPANY, INC., *Petitioners,* against TRADERS NATIONAL BANK OF KANSAS CITY, *Respondent.*

JOHN CHARLES McANINCH, EXECUTOR OF THE ESTATE OF JOHN W. McANINCH; DON J. GATENS; JOHN V. HANSEN; KENDALL ODEN; PAUL BETTIN; EARL GALLOWAY; JAMES R. MIKSCH; RALPH DEBRUIN; ED CRALL; FRANK DIRKS; FRED OLSON; FRANK RHODENBAUGH; AND ALBIA SALES COMPANY, INC., *Petitioners,*

vs.

JOHN H. KREAMER, WILLIAM L. TURNER, GAGE & TUCKER; WAYNE H. HOECKER; GEORGE COUGHLIN; THOMAS J. GUILFOIL; AND GENERAL BANCSHARES CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (App. A, *Infra,*) is not yet reported. The opinion of the United States District Court for the Western District of Missouri (App. D, *Infra,*) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was filed on December 13, 1985. Rehearing was denied on January 22, 1986 (App. B, *Infra,*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 §1.

STATUTORY PROVISIONS INVOLVED

Mo. ANN. STAT. §400.9-109 (Vernon 1965)

Mo. ANN. STAT. §400.9-307 (Vernon 1965)

STATEMENT OF THE CASE

Synopsis of factual situations: A bank made a loan to a person who represented himself to be a cattle rancher and later, when the debtor defaulted, tried to recover lost money from farmers who had purchased cattle from the debtor at an auction barn owned primarily by the debtor, the bank's actions against the farmers ended unfavorably for it and the farmers cattle-purchasers brought this malicious prosecution action against the bank, its attorneys, and others alleging that the bank, attorneys and others lacked probable cause to sue them under the facts then apparent and the applicable law.

The Underlying Actions: On September 2, 1975 Ray and Jolene Olson borrowed $1,500,000.00 from Traders National Bank of Kansas City ("TNB"). The bank obtained a security agreement labeled "Farm Products" which listed as collateral "3,150 calves and 128 bulls and all livestock now owned or hereafter acquired by debtor, more specifically listed in Schedule A attached hereto and made a part hereof." The attachment listed 7,977 head of cows. According to the loan officer, Ernest Harms, the security interest was intended to be attached to farm product collateral (as that term is defined by the Uniform Commercial Code) only. The bank filed a financing statement locally with the recorder of deeds in Sullivan County, Missouri. No central filing was made with the Secretary of State. TNB made a second loan to Ray Olson on December 18, 1975 for $400,000.00. The relevant security agreement listed as collateral "cows," "calves," "bulls," and "steers." Because the Olson loans exceeded TNB's loan limit, the Bank of St. Louis agreed to provide sums in excess of TNB's limit. General Bancshares Corporation owned TNB and the Bank of St. Louis.

In order to obtain the loans Ray Olson pledged as collateral a large quantity of cattle which were never inventoried by the bank and which by all indication, never existed on his 812 acres of land. Ray and Jolene Olson also were majority owners of the Milan Livestock Auction, through which the Olsons sold cattle.

In January, 1976, TNB realized that it had made an insecure loan to the Olsons and Charles Oliver, President of TNB, employed the law firm of Gage & Tucker in Kansas City, Missouri to take whatever steps were necessary to protect the bank's security and position. Attorneys handling the case for TNB at Gage & Tucker were

John Kreamer, William L. Turner, Wayne Hoecker, Peter Grannat and George Coughlin. John Kreamer was on the Board of Directors of TNB. Tom Guilfoil, counsel for the Bank of St. Louis and General Bancshares Corporation, was also involved. The president of TNB, Charles Oliver had been trained as a lawyer and had been a Probate Judge.

Gage & Tucker handled the investigation of the case. Through their investigation, which included inquiries of employees and neighbors, Gage & Tucker found the Olsons owned 812 acres of land and owned 26,260 pounds of corn but that they had no more than about 350 to 500 head of cattle on their pastures when the loan was made. However, in auditing the Auction Barn owned by the Olsons, Gage & Tucker ascertained that

> "4,468 head of cattle were sold by Ray W. Olson through the Milan Livestock Auction during the period from September 5, 1975 through January 8, 1976. This livestock was apparently purchased and sold on a short term basis. It appears that this group of cattle was never pastured or acquired for fattening or grazing purposes. It further appears that the 4,468 head of cattle represent the only viable collateral in which Trader's National Bank may seek to claim a security interest." (Coughlin Legal Memorandum of April 7, 1976).

Some of these cattle were purchased at one auction barn by Olson and then quickly resold through another.

—The Petitioners in this case are persons, primarily farmers, from states surrounding Missouri, who purchased cattle from Ray Olson through the Milan Livestock Auction between September 2, 1975 and January 20, 1976

(the "Cattle Purchasers"). These purchasers had no knowledge of any security interests that may have been held by others in the cattle they purchased.

On July 16, 1976, August 26, 1976 and September 9, 1976, Gage & Tucker, on behalf of TNB (and indirectly on behalf of General Bancshares Corporation), filed three separate conversion actions against the various cattle purchasers under the theory that they had converted cattle in which the bank had a security interest. In order to recover, the bank had to show that it had a security interest in the cattle held by the purchasers; the bank had to show that the cattle held by the purchasers were "farm products" as that word is defined in the Missouri version of the Uniform Commercial Code, and that they were not "inventory," in the hands of a seller engaged in farming operations. Mo. STAT. ANN. §§400.9-307, 400.9-109 (1965). As the three cases filed by the bank progressed it became apparent that the bank would be unable to prove that the cattle purchased from Olson through the Livestock Auction were "farm products." One case was dismissed by TNB without prejudice and on December 6, 1976 in the two other cases the Federal District Court denied the bank's Motion to Dismiss without Prejudice, but granted the cattle purchasers' Motions for Summary Judgment with Prejudice because the bank could not show that the cattle were farm products as defined by Section 400.9-109 Mo. STAT. ANN. (1965).

On April 7, 1976 George Coughlin, a recent associate with Gage and Tucker, authored a legal memorandum to William L. Turner. This memorandum was given to the bank as a statement of the firm's legal advice based on its factual investigation. The pertinent legal issue discussed therein was "whether Trader's can enforce their security interest against a subsequent purchaser of cattle

from an immediate purchaser from Olson" and the pertinent facts on which Coughlin based the legal research were as follows:

> "based on recent audits it has now been ascertained that 4,468 head of cattle were sold by Ray W. Olson through the Milan Livestock Auction during the period from September 5, 1975 through January 8, 1976. This livestock was apparently purchased and sold by Ray Olson on a short term basis. It appears this group of cattle was never pastured or acquired for fattening or grazing purposes."

These facts were based on an investigation done by Pat O'Reagan. On April 9, 1976, Pat O'Reagan authored a memorandum to William L. Turner regarding his investigation of files obtained from the office of the Milan Livestock Auction and of the office of the Circuit Clerk of Sullivan County:

> "It is not possible to give an absolutely accurate accounting of the cows bought and sold because the descriptions of the cows are not complete enough to know exactly which animal was bought or sold. It is possible to look at the records and determine when a large number of cattle have been bought or sold and when a succeeding sale results in the further movement of these cattle.
>
> As I previously informed you, Olson sold more than 4,400 head of cattle between September, 1975 and January, 1976.
>
> During this same period of time, we have records indicating that he purchased 3,389 head of cattle, which would seem to indicate that he had some 1,100 head on hand as of September 1, 1975. This is not a valid conclusion since we do not have complete records for

> Olson's purchases. It is evident from the files we did inspect that Olson did not keep all of his personal records there and he often made purchases at other barns or from other individuals."

George Coughlin concluded, in his memorandum that TNB could enforce their security interest in the 4,468 head of cattle. George Coughlin's conclusion was reached through an analysis of §§400.9-109, 400.9-307 Mo. STAT. ANN. (Vernon 1965) Section 400.9-307 provides:

> "Protection of buyers of goods. (1) A buyer in the ordinary course of business ((9) §400.1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence". . .

"Farm Products" has a special definition under the code. It is defined in §400.9-109. Section 400.9-109 says as follows:

> **CLASSIFICATION OF GOODS - CONSUMER GOODS, "EQUIPMENT", "FARM PRODUCTIONS", "INVENTORY".**
>
> Goods are
>
> 1. "Consumer Goods" if they are used or bought for use primarily for personal, family or household purposes;
>
> 2. "Equipment" if they are used or bought for use primarily in business (including farming or profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the

definition of inventory of farm products or consumer goods;

3. "Farm Products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, milk and eggs, and if they are in the position of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

4. "Inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them or if they are raw materials, work in progress or materials used or consumed in the business. Inventory of a person is not to be classified as his equipment.

Uniform Commercial Code Comment 2 provides

"the classes of good are mutually exclusive; the same property cannot at the same time and as to the same person be both equipment and inventory, for example. In borderline cases - a physician's car or a farmer's jeep, which might be either consumer goods or equipment - the principal use to which the property is put should be considered as determinative. Goods can fall into different classes at different times; a radio is an inventory in the hands of a dealer and consumer goods in the hands of a householder."

Note 3 provides:

"The principal test to determine whether goods are inventory is that they are held for immediate or ulti-

> mate sale. Implicit in the definition is the criteria that the prospective sale is in the ordinary course of business . . ." Note 4 provides "Goods" are "Farm Products" only if they are in the possession of a debtor engaged in farming operations . . . The terms "crops", "livestock", "farming operations" are not defined . . . "when crops or livestock or their products come into the possession of a person not engaged in farming operations, they cease to be "farm products". If they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processer as raw materials, they become inventory."

To determine whether the cattle sold by Olson through the Livestock Auction were farm products within the definition of the code, George Coughlin examined the following cases: *United States v. Topeka Livestock Auction, Inc.*, 392 F.Supp. 944 (D.C. Ind. 1975); *Burlington National Bank v. Strauss*, 50 Wis.2d 270 [8 UCC Rep. 944] (1971); *Swift and Company v. Jamestown National Bank*, 426 F.2d 1099 [7 UCC Rep. 788] (8th Cir. 1970); *First State Bank v. Maxfield*, 485 F.2d 71 [13 UCC Rep. 331] (10th Cir. 1973); *In Re: Cadwell, Martin Meat Co.*, [10 UCC Rep. 710] E.D. California 1970); *Baker Production Credit Association v. Long Creek Meat Co., Inc.*, 513 P.2d 1129 [13 UCC Rep. 531] (OR. 1973); *Clovis National Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 [4 UCC Rep. 137] (1967); *United States v. Hext*, 444 F.2d 804 (5th Cir. 1971). Coughlin recognized that the Court in the *First State Bank v. Maxfield* case held that where cattle was purchased and sold by the debtor in his capacity as a cattle trader rather than in his capacity as a farmer could be classified as inventory under the UCC. Coughlin distinguished the *Maxfield* case from the case at hand on the grounds that in that case the security interest

covered livestock for farming operations rather than for "personal, family or household purposes" or for "business purposes" and that Traders' security agreement was not intended to be limited to any particular category of cattle. Coughlin failed to note that the use of collateral determines the classification of goods under the code and that a security interest in inventory had not been perfected by Traders National Bank. The security agreement was labeled "Farm Products" and it was filed locally only, not centrally with the Secretary of State. Coughlin also recognized that the Court in *United States v. Hext*, 444 F.2d 804, a case closely analogous to the case he was working on determined that cotton sold by a farmer/debtor to a gin of which the farmer/debtor was sole owner and then to a buyer in the ordinary course was transferred from the category of "farm products" to "inventory" and the cotton purchaser took free of any security interest held by the bank.

The Malicious Prosecution Action: Sixteen of the Defendants sued by the bank then brought this action against the bank alleging malicious prosecution in the instigation and continuation of the underlying conversion action. Twelve of these same Defendants later filed a more abbreviated complaint against the Gage & Tucker law firm and four of its members, Thomas J. Guilfoil and the General Bancshares Corporation, alleging malicious prosecution in instigating the same litigation which formed the basis of the claim of malicious prosecution against Traders National Bank.

The malicious prosecution action against the bank went to trial and judgment was entered in favor of the bank on November 13, 1984. The action brought against the bank's attorneys, its holding company, and the holding

company's attorney was dismissed on a Motion for Summary Judgment before trial and one Plaintiff, Albia Sales Company, Inc., was dismissed in both actions prior to trial. Both the District Court and the Court of Appeals for the Eighth Circuit found that the bank's attorneys, the holding company, and the holding company's attorneys had probable cause as a matter of law.

REASONS FOR GRANTING THE WRIT

I.

The decision in this case misapplies state law and expands the number of frivolous claims attorneys, and their clients, may bring with impunity. This impunity is contrary to sound judicial policy in that it allows frivolous claims to be brought against innocent persons, clogs the judicial system with unnecessary litigation and absolves attorneys of responsibility for their acts to persons other than their clients.

The Federal Courts are bound to follow the substantive law of the state in which they sit. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938); *England v. Gulf & Western Manufacturing Co.*, 728 F.2d 1026 (8th Cir. 1984).

The lower courts correctly stated Missouri malicious prosecution law regarding probable cause and held that the standard for showing the existence of probable cause is applicable to attorneys and clients alike: "Probable cause for initiating a civil action consists in a belief in the facts alleged, based on sufficient circumstances to reasonably induce such belief by a person of ordinary prudence in the same situation plus a reasonable belief by such person that under such facts the claim may be valid under the applicable law." *Haswell v. Liberty Mutual Insurance*

Company, 557 S.W.2d 628 (Mo. 1977); *McGuire v. Wilcher*, 689 S.W.2d 719 (Mo. Ct. App. 1985).

The lower courts erred in their application of the law to the facts in dismissing petitioners' action for failure to show that the attorneys lacked probable cause to instigate conversion actions against petitioners. Deference to the lower courts' application of state law is not required where the Courts applied the law improperly. *Hollman v. Liberty Mutual Insurance Company*, 712 F.2d 1259 (8th Cir. 1983). Although probable cause is a question of law for the courts to decide when the facts are undisputed, the question of the defendant's belief in the facts should have gone to the jury. *Stewart v. Sonneborn*, 98 U.S. 187 (1878); *Davis v. Giles*, 769 F.2d 813 (D.C. Cir. 1985).

If it were established that the attorneys, through their investigation, believed that the bank had a security agreement in "farm products" under the Uniform Commercial Code, but not in "inventory", and that defendants believed that the bank's debtor did not fatten or graze the cattle that they claimed was held for short-term resale, then it was unreasonable as a matter of law for the attorneys to believe they could resort to the courts by using a perverted interpretation of statutory and case law to force innocent third parties to pay money lost by a bank in making a bad loan.

Evidence presented to the trial court and appellate court showed that at the time the defendants recommended filing suits against the cattle purchasers, the cattle purchased by Petitioners would have appeared to have been inventory and thus was not covered by the bank's security agreement. The evidence further showed that the attorneys apparently rationalized the instigation of the actions:

> "In the case at bar, the security agreement makes no distinction between grazing or fattening cattle and trading cattle . . . It is quite apparent that Ray Olson was a person engaged in farming operations. . . It is further apparent that Ray Olson was in possession of livestock. Under these circumstances . . . it would appear that a reasonable argument can be made that the 4,468 cattle sold by the Milan Livestock Auction were 'farm products' within the meaning of Section 400.9-109(3) and 400.9-307(1)."

In actuality the security agreement, which was labeled "Farm Products", covered

> "3,150 calves and 128 bulls and all livestock now owned or hereafter acquired by debtor, more specifically listed in Schedule A attached hereto and made a part hereof."

The attachment listed 7,977 head of cows. The subsequent security agreement covered "cows," "calves," "bulls," and "steers." The loan officer who prepared the loan said that the security interest was intended to attach to farm product collateral only; and the financing statement was filed locally as for farm products, but not centrally as it would be to perfect an interest in inventory. Thus, the security interest would have covered only farm product cattle. Although the defendants were aware that the bank's debtor owned 812 acres and that he owned 26,260 pounds of corn and that there were loading chutes on the land, there was no evidence that Ray Olson owned cattle that was fattened or grazed in a farming operation. Defendants were aware, however, that the bank's debtor owned an auction barn through which trading cattle could be sold.

Under the facts apparent to the attorneys which were obtained through their own investigation, not their client's, it was unreasonable for them to believe they had a claim under the applicable law, that is, sections 400.9-109 and 400.9-307 of Article Nine of the Missouri version of the Uniform Commercial Code and case law.

The underlying concept of Article Nine of the Uniform Commercial Code (Secured Transactions) is the classification goods. (*See* Comment to 9-109). Under §400.9-109 the use of a good is the basic criteria for classifying goods. Mo. Rev. Stat. §400.9-109 Missouri Code Comment, Uniform Commercial Code, Comment 2. Subsections 1 and 2 of §400.9-109 refer only to a good's use as being determinative of its classification:

Goods are "(1) 'Consumer Goods' if they are used or bought for use primarily for personal family or household purposes." Goods are "(2) 'Equipment' if they are used or bought for use primarily in business . . ." Subsection 3, defining "farm products" refers to the "use of livestock and in addition requires that the goods be in the possession of a debtor engaged in raising, fattening, grazing or other farming operations": Goods are "(3) 'Farm Products' if they are crops or livestock or supplies used or produced in farming operations . . . and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory." Subsection 3 provides a two-prong test. Goods are "(4) 'Inventory' if they are held by a person who holds them for sale or lease . . ."

The Missouri Code Comments and Uniform Commercial Code Comments explain how a good can be classified in one category when the debtor owning it is acting in

one capacity and the good can be classified in another category when the debtor is acting in a different capacity. Case law showing that livestock would be classified either as inventory or farm products depending on its use existed at the time the underlying suits were filed. *First State Bank v. Maxfield*, 485 F.2d 71 (10th Cir. 1973); *United States v. Hext*, 444 F.2d 804 (5th Cir. 1971).

Because the cattle in the underlying case were used for short-term resale through an auction barn, and were not pastured or grazed and because Defendants had no evidence that the debtor was engaged in farming operations it was unreasonable for Defendants to believe they had a claim against the cattle purchasers. To ignore the use of the cattle resulted in a strained, unreasonable interpretation of the statute. Interpretation of the statute was not one on which reasonable lawyers could differ. It was unreasonable because it was contrary to the statutory scheme and case law and because as it was used it caused persons with whom the bank had no legal relationship to be haled into the State of Missouri and caused such persons vexation and fear of losing their farms and livelihoods.

The lower Federal Courts misapplied Missouri law when they held that under the facts of this case it was reasonable for Defendants to file actions against Petitioners.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1215

John Charles McAninch, Executor of the Estate of John W. McAninch; George Droege; Mrs. Chester Thompson and Jerald A. Thompson, d/b/a Thompson & Sons; Don J. Gatens; John V. Hansen; Kendall Oden; Paul Bettin; Earl Galloway; James R. Miksch; Ralph DeBruin; Ed Crall; Frank Dirks; Fred Olson; Orval L. Miller; Frank Rhodenbaugh and Albia Sales Company, Inc.,
Appellants,
v.
Traders National Bank of Kansas City,
Appellee.

No. 85-1216

John Charles McAninch, Executor of the Estate of John W. McAninch; George Droege; Mrs. Chester Thompson and Jerald A Thompson, d/b/a Thompson & Sons; Don J. Gatens; John V. Hansen; Kendall Oden; Paul Bettin; Earl Galloway; James R. Miksch; Ralph DeBruin; Ed Crall; Frank Dirks; Fred Olson; Orval L. Miller; Frank Rhodenbaugh and Albia Sales Company, Inc.,
Appellants,
v.
John H. Kraemer; William L. Turner; Gage & Tucker; Wayne H. Hoecker; George Coughlin; Thomas J. Guilfoil and General Brancshares Corporation,
Appellees.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: September 9, 1985
Filed: December 13, 1985

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

HENLEY, Senior Circuit Judge.

These consolidated appeals arise from two malicious prosecution actions. Between September 2, 1975 and January 20, 1976, appellants purchased cattle at the Milan Livestock Auction. In July, 1976 Traders National Bank (Traders) filed conversion actions against appellants, alleging that appellants had purchased the cattle subject to the bank's security interest. The conversion actions terminated in appellants' favor. Thereafter, appellants filed a malicious prosecution action against Traders and an action against Traders' counsel, the law firm of Gage & Tucker and four of its members (Gage & Tucker), Traders' holding company, General Bancshares, and Thomas J. Guilfoil. In case No. 85-1216, appellants appeal from an order granting summary judgment of the district court[1] entered upon a jury verdict in favor of Traders. In case No. 85-1216, appellants appeal from an order granting summary judgment in favor of Gage & Tucker, General Bancshares, and Guilfoil. We affirm.[2]

---

1. The Honorable Joseph E. Stevens, Jr., United States District Judge for the Eastern and Western Districts of Missouri.

2. Pending before the court are appellees' motions to dismiss case No. 85-1216 and motions to dismiss Albia Sales, Inc. (Albia) as an appellant in Nos. 85-1215 and 85-1216. Appellees allege that the single notice of appeal filed in the two consolidated cases did not specify an appeal from the order granting

(Continued on following page)

The relevant facts can be summarized as follows. In September and December of 1975 Traders, with the participation of the Bank of St. Louis (BOSL)[3] made two loans totalling $1,900,000.00 to Ray Olson of Milan, Missouri. Ray Olson and his wife owned more than 95 per cent of the stock in the Milan Livestock Auction. The loans were secured by agreements pledging "all livestock now owned or hereafter acquired by Debtor." On Jan-

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Footnote continued—

summary judgment in favor of Gage & Tucker, General Bancshares, and Guilfoil or from the order dismissing Albia as a plaintiff. We deny the motions.

Fed. R. App. 3(c) provides that a notice of appeal "shall designate the judgment, order or part thereof appealed from." However, there is "a policy of liberal construction of notices of an appeal in situations where intent is apparent and there is no prejudice to the adverse party[.]" *Simpson v. Norwesco, Inc.*, 563 F.2d 1007, 1009 n.2 (8th Cir. 1978). We find the intent to appeal the orders was apparent and appellees have not demonstrated prejudice. The intent to appeal the order granting summary judgment was evident from the filing of a premature notice of appeal and the inclusion of the order on the appeal information form. *See Foman v. Davis*, 371 U.S. 178 (1967). The intent to appeal the order dismissing Albia was apparent given the procedural history of the case, the listing of Albia on the caption of the notice of appeal, and the inclusion of the order on the appeal information form. Furthermore, the parties have addressed the merits in their briefs. *See United States v. One 1977 Mercedes Benz*, 708 F 2d 444, 451 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 981 (1984).

We find that the district court properly dismissed Albia as a plaintiff on the ground that Albia lacked capacity to sue pursuant to R.S. Mo. § 351.635. The statute provides that a foreign corporation who does business in Missouri must obtain a certificate of authority. If the corporation fails to procure a certificate, the corporation is barred from bringing suit. We need not address Albia's argument on appeal that it was exempt from § 351.635. This argument apparently was not raised in the district court. In addition, we note that because we find that appellees had probable cause to file the conversion actions, the district court's dismissal of Albia as a plaintiff has little, if any, practical effect.

3. Traders and BOSL were both owned by General Bancshares.

uary 12, 1976 Ernest Harms, a loan officer at Traders, went to Milan to inspect the cattle securing the loan. After Harms could not locate any cattle, he informed officials at Traders and BOSL. Charles Oliver, president of Traders, contacted Gage & Tucker to take whatever steps were necessary to protect the bank's security interest. On January 14, 1976 John Kraemer and Peter Granat of Gage & Tucker began work on the case. Within a few days, officials from Traders and BOSL went to Milan to investigate. Later Granat discussed the matter with BOSL's counsel, Thomas J. Guilfoil, and on January 22, 1976 Granat requested a state court injunction to prevent Olson and the livestock auction from disposing of assets pending the outcome of a suit on the promissory note. On February 6, 1976 the state court issued an injunction and attachmer t order.

On March 23, 1976 William Turner, the Gage & Tucker partner who was supervising the case, asked George Coughlin, a Gage & Tucker associate, to research the question whether Traders' security interest could be "traced" to the cattle purchasers. In a memorandum dated April 7, 1976, Coughlin concluded that "[b]ased on the facts presently known and applying the [applicable] legal standards, it would appear that Traders National Bank duly perfected a security interest in the 4,460 head of cattle sold by Olson through the Milan Livestock Auction. This security interest continued in the cattle after their sale to third party purchasers and thereafter." In the memo, Coughlin assumed that the cattle had been purchased and sold on a short term basis and had not been pastured or acquired for fattening or grazing. Based on Gage & Tucker's extensive investigation which revealed, among other things, that Olson owned an 812 acre ranch and 26,260 pounds of corn and leased 2,000 acres of land on

which he grew hay, Coughlin concluded that Olson was a farmer.

Coughlin's legal analysis was based on §§ 9-109 and 9-307 of the Uniform Commercial Code (UCC), R. S. Mo. §§ 400.9-109 and 400.9-307. According to the memo, Traders' security interest in the cattle was dependent upon whether the cattle were "farm products" or "inventory" as defined in the UCC. Good faith buyers or inventory take free of a security interest but buyers of farm products do not. Section 9-109 defines farm products as "crops or livestock or supplies used or produced in farming operations . . . and are in possession of a debtor engaged in raising, fattening or other farm operation." Coughlin's theory of recovery against the purchasers of the cattle was that the cattle were farm products because they were livestock in possession of a farmer. Under Coughlin's theory, the fact that the cattle were not used or produced in farming operations was irrelevant.

Coughlin's memo was given to Jack Minton, president of BOSL, a director of Traders, and an officer and director of General Bancshares, to Oliver, and to Guilfoil. After some discussion between Turner and Guilfoil concerning the parties to a suit and the fee arrangements and after obtaining authorization to file suit from Oliver, who believed that Guilfoil and Minton concurred in the decision, in July 1976 Gage & Tucker filed a state and two federal conversion actions against the cattle purchasers. During discovery, Gage & Tucker encountered unexpected evidentiary problems, including changed testimony regarding Olson's status as a farmer. Gage & Tucker advised Traders that because of the problems a favorable judgment on the conversion suits was unlikely and advised Traders to dismiss the suits without prejudice. In No-

vember, 1977 the state action was dismissed without prejudice. In December, 1977 the federal district court entered summary judgment with prejudice against Traders.

In 1978 appellants filed a malicious prosecution action against Traders in federal district court. In 1982 appellants filed a malicious prosecution action against Gage & Tucker, General Bancshares, and Guilfoil. In March, 1983 the cases were consolidated for trial. Both sides moved for summary judgment, alleging that the material facts were undisputed. Prior to trial, the district court orally granted motions for summary judgment in favor of Gage & Tucker, General Bancshares, and Guilfoil, finding that as a matter of law appellees had probable cause to file the conversion actions. The district court denied Traders' motion for summary judgment. In addition on appellees' motions, the district court dismissed Albia Sales, Inc. as a plaintiff, finding that Albia lacked capacity to sue. The remaining plaintiffs went to trial against Traders. The jury returned a verdict in favor of Traders.

In this diversity case, it is undisputed that Missouri law applies. At the outset we note that "Missouri law does not favor suits in malicious prosecution[,]" *Zahorsky v. Griffin*, 690 S.W.2d 144, 151 (Mo. App. 1985), and that "[t]he role of the jury in a malicious prosecution action is more limited than in the usual civil proceeding." *McGuire v. Wilcher*, 689 S.W.2d 719, 721-22 (Mo. App. 1985). *See also Hernon v. Revere Copper and Brass Co., Inc.*, 494 F.2d 705, 707 (8th Cir.) ("the general rule is that suits for malicious prosecution are viewed with disfavor and are to be carefully guarded against"), *cert. denied*, 419 U.S. 867 (1974).

Under Missouri law, "[t]o maintain a cause of action in malicious prosecution, a plaintiff has the burden of

proving that the defendant instituted the original judicial proceeding without probable cause and with malice, the proceeding terminated in the plaintiff's favor, and the plaintiff was damaged." *Zahorsky v. Griffin,* 690 S.W.2d at 147. "The Supreme Court of Missouri has recognized the definition of probable cause for the initiation of a civil action to consist of 'a belief in the facts alleged, based on sufficient circumstances to reasonably induce such a belief by a person of ordinary prudence in the same situation, plus a reasonable belief by such person that under the facts the claim may be valid under the applicable law.'" *Id.* at 151, quoting *Haswell v. Liberty Mutual Ins. Co., Inc.,* 557 S.W.2d 628 (Mo. banc 1977). "Where facts concerning the issue of want of probable cause in a suit for malicious prosecution are not in dispute the issue becomes one of law to be decided by the court." *McGuire v. Wilcher,* 689 S.W.2d at 721.

Appellants argue that the district court erred in granting summary judgment in favor of Gage & Tucker because appellants established that Gage & Tucker acted without probable cause as defined in *Haswell.* Appellants assert that the undisputed facts reveal that Gage & Tucker conducted an inadequate factual investigation and had an unreasonable belief that the facts stated a conversion claim. Gage & Tucker counters that under Missouri law when an attorney is a defendant in a malicious prosecution action a plaintiff is held to a higher standard of proof. Relying on *Henderson v. Cape Trading Co.,* 289 S.W. 332, 336 (Mo. 1926), Gage & Tucker asserts that a plaintiff can prevail only on a showing that the attorney had "actual knowledge that the claim was groundless."

In a diversity case we give great deference but not bound to the district court's interpretation of state law.

Hollman v. Liberty Mutual Insurance Co., 712 F.2d 1259, 1261 (8th Cir. 1983). In this case, although the district court noted the *Henderson* decision, the court properly applied the *Haswell* standard to the attorney-defendant. Two recent Missouri appellate court decisions support the district court's analysis. In *Zahorsky v. Griffin,* the state appellate court discussed *Henderson* and other early Missouri cases dealing with the liability of an attorney as a defendant in a malicious prosecution case. 690 S.W.2d at 153-54. The court concluded that *Haswell's* definition of probable cause was "applicable to any defendant in an action for malicious prosecution and that the statement in *Henderson* with respect to the determination of probable cause on the part of an attorney must be within the context of *Haswell.*" *Id.* at 153. The court held that the proper inquiry when an attorney is a defendant in a malicious prosecution action is whether the attorney had a good faith belief in the facts disclosed by the client and a reasonable belief that the facts stated a valid claim. *Id.* at 154. In *McGuire v. Wilcher,* the appellate court also applied *Haswell's* definition of probable cause to an attorney defendant. The court undertook to determine what the "reasonable belief of the ordinary, prudent attorney would be in the circumstances." 689 S.W.2d at 722.

Applying *Haswell* to the undisputed facts, we agree with the district court that Gage & Tucker had probable cause to recommend that Traders file the conversion actions. First, as the district court noted, Gage & Tucker conducted an extensive factual investigation. Second, the district court correctly found that Gage & Tucker had a reasonable belief that the facts stated a conversion claim. Appellants argued throughout the proceedings in the district court and continue to argue on appeal that they should prevail because Gage & Tucker's legal theory was

erroneous. Appellants' argument is misdirected. The district court properly focused its inquiry solely on the question of probable cause. As the court noted, it was "not ruling on the ultimate merits of the question of whether the cattle in possession of a debtor engaged in farming operations but not actually 'used or produced' in those operations would be classified as farm products or inventory." Rather, the court correctly determined whether under the facts as they reasonably appeared at the time the suits were filed Gage & Tucker had a reasonable basis to believe the claim was valid. *See Zahorsky v. Griffin*, 690 S.W. at 154 (issue in malicious prosecution is "not whether reasonable minds could differ as to outcome of the underlying . . . action"); *McGuire v. Wilcher*, 689 S.W.2d at 723 (courts in malicious prosecution actions do not "re-decide" underlying action but only whether defendants had a reasonable belief in claim). Given the ambiguities of the statutory language and the paucity of controlling case law, we agree with the district court that Gage & Tucker had a reasonable belief that the facts known at the time the suits were filed stated a conversion claim. *See id.* at 722-24 (attorney may have a reasonable belief in a claim even though legal validity of claim is uncertain).

We also find that the district court properly granted summary judgment in favor of Guilfoil and General Bancshares. The undisputed facts demonstrate that Guilfoil and General Bancshares relied on the advice of Gage & Tucker. Under Missouri law, "[g]ood faith reliance on advice of counsel in commencing judicial proceedings against another is a defense to an action for malicious prosecution . . . if there has been full disclosure . . . of all material facts, including those within [the] client's actual knowledge and those of which he might have

learned by reasonable diligence." *Haswell v. Liberty Mutual Insurance Co.*, 557 S.W.2d at 636. The judicial proceeding must be "pursuant to the legal advice . . . and not in pursuance of a previous fixed determination to commence such a proceeding." *Id.* at 636-37 n.6. Contrary to appellants' assertions, there is nothing in the record to suggest that Guilfoil or General Bancshares were predisposed to file suit or were acting from an improper motive.

We also find that substantial evidence supports the jury verdict that Traders relied on the advice of Gage & Tucker. Again, there is no evidence of a predisposition or bad motive. Appellants attempt to demonstrate bad faith because Oliver believed that the question whether the cattle were "farm products" or "inventory" was a close one and indicated he wanted a second opinion. We do not view this as evidence of bad faith, but rather that Oliver exercised good faith and diligence in authorizing the filing of the suits.

Appellants make numerous other arguments regarding alleged trial errors. Assuming the claims are properly before this court, we find them to be without merit.

Accordingly, the judgments of the district court are affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-1215/1216-WM

John Charles McAninch, etc., et al.,
Appellants,
vs.
Traders National Bank of Kansas City,
Appellee.

Appeals from the United States District Court for the
Western District of Missouri

Appellants' petition for rehearing has been considered by the Court and is hereby denied

January 22, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-1215 & 85-1216-WM

John Charles McAninch, etc., et al.,
Appellants,
vs.
Traders National Bank of Kansas City, et al.,
Appellees.

Appeal from the United States District Court for the
Western District of Missouri.

On consideration of appellants' motion to stay issuance of mandate pending certiorari proceedings, it is ordered by the Court that this motion be denied.

February 3, 1986

APPENDIX D

(Filed December 6, 1984)

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Docket Number 78-1009-CV-W-8 & 82-1062-CV-W-8

JESSIE IRENE McANINCH, et al.,

v.

TRADERS NATIONAL BANK OF KANSAS CITY, et al.

Honorable Joseph E. Stevens, Jr.

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

1. The motion of defendants Gage & Tucker, John Kreamer, William Turner, Wayne Hoecker and George Coughlin for summary judgment in their favor filed September 20, 1984, is granted. Judgment for those named defendants is hereby entered and costs are assessed against plaintiffs.

2. The motion of defendant Thomas J. Guilfoil for summary judgment in his favor filed September 17, 1984,

is granted. Judgment for Thomas J. Guilfoil is hereby entered and costs are assessed against plaintiffs.

3. The Motion for Summary Judgment of General Bancshares Corporation filed September 21, 1984, is granted. Judgment for General Bancshares is hereby entered and costs are assessed against plaintiffs.

4. The motions of plaintiffs for summary judgment on their claim for malicious prosecution against all defendants is denied. Judgment is entered for defendants and the costs of this motion are assessed against plaintiffs.

5. The motion of defendant Traders National Bank of Kansas City for summary judgment is denied and the costs of the motion are assessed against defendant Traders National Bank of Kansas City.

Clerk—R.F. Connor
(By) Deputy Clerk—Tenilla Sheehan
Date—12/6/84

(Filed December 6, 1984)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 78-1009-CV-W-8

JESSIE IRENE McANINCH, Executrix of the Estate of John W. McAninch, et al.,
Plaintiffs,
vs.
TRADERS NATIONAL BANK OF KANSAS CITY,
Defendant.

No. 82-1062-CV-W-8

JESSIE IRENE McANINCH, Executrix of the Estate of John W. McANINCH, et al.,
Plaintiffs,
vs.
ELMER B. HODGES, et al.,
Defendants.

ORDER

Immediately prior to the trial of these consolidated cases, the court indicated its intent to grant the summary judgment motions of defendants Guilfoil, Gage & Tucker, and General Bancshares and to deny plaintiffs' motion for partial summary judgment on liability and the motion of defendant Traders National Bank (hereinafter Traders). With the filing of this opinion, those rulings become docketed orders.

This suit arose out of two earlier actions filed by Traders against various Iowa cattlemen who purchased cattle from a defaulting and defrauding debtor, Ray Olson. In the filing of those actions, the bank alleged that it had a perfected security interest in the cattle at issue. After resolution of the dispute in favor of the cattlemen before trial, sixteen of those defendants then brought this suit against Traders National Bank alleging malicious prosecution in instigating and continuing to prosecute the civil actions, abuse of process and prima facie tort. Twelve of these same defendants later filed a more abbreviated complaint against the Gage & Tucker law firm and its members, the Guilfoil law firm and its members, and General Bancshares, the holding company owner of Traders, claiming only malicious prosecution in instigating the same litigation which formed the basis of the claim of malicious prosecution against Traders. After consolidation of the two suits and adjustments in the dramatis personae by agreement, the cast of the defense at the time these motions were ruled included Traders National Bank of Kansas City, the Gage & Tucker law firm and four of it members, Thomas J. Guilfoil, a St. Louis lawyer, and General Bancshares, the holding corporation. With the cases in this posture the court ruled on the five motions for summary judgment as previously indicated.

1. *Motions of Gage & Tucker and Its Member Defendants Guilfoil and General Bancshares Corporation*

We have been told repeatedly by the Court of Appeals for the Eighth Circuit that a court may grant summary judgment only when there is no genuine issue of material fact for the jury to decide and the movant is entitled to judgment in his favor as a matter of law. *See* Fed. R. Civ. P. 56(c), *Hartford Accident and Indemnity Co. v. Stauffer Chemical Co.*, No. 83-2309, slip op. at 4 (8th Cir.

Aug. 28, 1984). In deciding whether a question of fact exists, the trial court must view the evidence in the light most favorable to the party opposing the motion for summary judgment. *Hartford Accident and Indemnity Co.*, No. 83-2309, slip op. at 4. The court has reviewed the evidence available at the time these motions were considered in that light.

While filed and briefed separately, these motions all turn on a common question—whether the record demonstrates as a matter of law that there was probable cause to recommend or approve the filing of the actions against the various then-defendants who are now plaintiffs. Absence of probable cause is an essential element of any action for malicious prosecution. *Stafford v. Muster*, 582 S.W.2d 670 (Mo. 1979) (en banc). Having concluded that the record demonstrates that defendants Gage & Tucker, Guilfoil, and General Bancshares Corporation had probable cause to recommend or approve the filing of the actions which now form the basis for this malicious prosecution action against them, the court hereby grants the summary judgment motions of these defendants.

Critical to the expeditious and economical resolution of this question of probable cause is a recognition that in this case plaintiffs, as well as defendants, in their filings and during their oral presentation at pretrial conferences, acknowledged that the facts are undisputed which underlie a determination of the probable cause issue. Thus:

> By their motion, plaintiffs have moved the Court to enter summary judgment in their favor on the basis that material, uncontested facts show that plaintiffs are entitled to judgment as a matter of law on their claim of malicious prosecution.

> Plaintiffs are entitled to summary judgment on the basis that *undisputed facts provide a basis by which the Court may rule as a matter of law.*

Suggestions in Support of Plaintiffs Jesse Irene McAninch, et al.'s Motion for Summary Judgment Against Defendant Gage & Tucker at 1, 6 (emphasis added).

> Because the *facts on which defendants Gage & Tucker relied are clear* and because the law revealing that those facts provided no basis for a cause of action is clear, the Court, if it is to decide this case on summary judgment, must find in favor of the plaintiffs.

Suggestions in Opposition to Motion of Defendants Gage & Tucker for Summary Judgment at 17 (emphasis added).

The existence of probable or reasonable cause is a question for the court when there is no dispute as to the basic facts known to the defendant. In *Dodson v. MFA Insurance Co.*, 509 S.W.2d 461 (Mo. 1974), the court concluded as a matter of law that the defendant acted with probable cause.

> There was no occasion to submit to the jury for its determination the circumstances under which [defendant] acted. Those circumstances are revealed by evidence on which there was no conflict and the only question under the evidence was whether or not [defendant's] "conduct measured up to the standard of the reasonable man," a question of law and not one of fact in a case such as this.

509 S.W.2d at 467-68.

The Eighth Circuit, in *Hernon v. Revere Copper & Brass, Inc.*, 494 F.2d 705 (8th Cir. 1974), reached the

same conclusion as did the Missouri Supreme Court in *Dodson, supra,* with respect to the function of the court in determining the existence of probable cause in a malicious prosecution action. There, the trial court overturned a jury verdict in favor of the plaintiff, holding that no dispute as to the material facts existed and that the defendant presented a complete defense to the malicious prosecution action as a matter of law. The Eighth Circuit affirmed, noting that

> Unlike other tort actions the rule in malicious prosecution cases appears to be that the court determines the reasonableness of conduct. This rule is almost universally accepted in the cases.

Id. at 707.

Citing Restatement Second of Torts, § 673, Comment (d) made applicable by § 674 Comment (f), the court explained that

> [T]he jury has only the function of finding the circumstances under which defendant acted. The court determines whether, under the circumstances, the termination was sufficiently favorable to the accused, and whether the defendant had or had not probable cause. . . .
>
> The reason for this rule has been said to be that, were probable cause left to the jury the rights of defendants might not be sufficiently safeguarded and the bringing of complaints would be discouraged. . . . In this same vein, the general rule is that suits for malicious prosecution are viewed with disfavor and are to be carefully guarded against. . . . [M]alicious prosecution cases present situations difficult for the jury to distinguish. . . .

Id.

The standard for determining probable cause is stated in *Haswell v. Liberty Mutual Insurance Co.*, 557 S.W.2d 628, 633 (Mo. 1977) (en banc) as follows:

> [P]robable cause for initiating a civil action consists of a belief in the facts alleged, based on sufficient circumstances to reasonably induce such belief by a person of ordinary prudence in the same situation, plus a reasonable belief by such person that under such facts the claim may be valid under the applicable law.

Plaintiffs do not contest Gage & Tucker's good faith belief in its claim nor do they dispute the facts known to Gage & Tucker which formed the basis for the earlier suit. In addition, plaintiffs do not set forth facts contesting Gage & Tucker's repeated assertions that it had no "actual knowledge" that any allegations in the petition were either incorrect or groundless. *See Henderson v. Cape Trading Co.*, 289 S.W. 332, 336 (Mo. 1926). Instead, they argue that Gage & Tucker's construction of R.S.Mo. § 400.9-109(3) was erroneous, and, therefore, that Gage & Tucker's conduct was not reasonable.[1]

It is undisputed that, to have *prevailed* in the earlier suits, Traders would have had to prove that the cattle purchased from Ray Olson were "farm products." If the cattle were inventory, the purchasers would take free of any security interest. R.S.Mo. § 400.9-307(1). Plaintiffs

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1. R.S.Mo. § 400.9-109(3), states that goods are

> 'Farm products' if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory.

argue that the phrase "used or produced in farming operations" must be applied to the word "livestock" in R.S.Mo. § 400.9-109(3), so that Ray Olson's cattle would not be farm products unless they were used or produced in farming operations.

Defendants' argument is premised on the same facts and assumes that cattle were *not* used or produced in farming operations. According to defendants, plaintiffs' construction of R.S.Mo. § 400.9-109(3) violates Missouri's long-established "last antecedent doctrine," which mandates that

> [R]elative and qualifying words, phrases or clauses are to be applied to words or phrases in immediate context . . . and are not to be construed as extending to or including others more remote.

Bartley v. Special School Dist. of St. Louis County, 649 S.W.2d 864, 869 (Mo. banc 1983). Application of this doctrine to R.S.Mo. § 400.9-109(3) means that "used or produced in farming operations" applies only to "supplies" and *not* to "livestock." Under Gage & Tucker's theory, Traders would have prevailed in the earlier suits if it showed that Ray Olson was engaged "in raising, fattening, grazing or other farming operations."

Before Gage & Tucker, on behalf of Traders, filed suit, it conducted an extensive investigation. Specifically, plaintiffs do not dispute that:

1. Upon initial contact with Traders Bank, Gage & Tucker immediately took statements from every member of the loan committee at the Bank. (Exhibit B, p. 16, Line 25 - p. 17, Line 7).

2. Gage & Tucker's "team," consisting of at least three attorneys, worked nearly full-time on the case and

the investigation from its inception in January, 1976. (Exhibit B, p. 21, Line 21 - p. 22, Line 8).

3. Gage & Tucker's in-house investigator went with the Sheriff and two people from Traders Bank to inspect the 15-20 pastures and ranches where the cattle had been. (Exhibit B, p. 24, Lines 9-19).

4. Gage & Tucker took statements and depositions from all of Olson's neighboring landowners regarding whether there had been cattle on his land. (Exhibit B, p. 27, Lines 10-19; p. 30, Line 25 - p. 31, Line 9).

5. Gage & Tucker interviewed former employees of Olson. (Exhibit B, p. 34, Lines 6-9).

6. A team of investigators from Gage & Tucker examined records of sales and purchases by Olson at Milan Livestock Auction, and spent several days doing so. (Exhibit B, p. 37, Line 20 - p. 39, Line 6; p. 22, Lines 2-8).

7. Gage & Tucker took statements "from all of the people at Commerce Bank that had anything to do with this loan," and thereby discovered extensive details about the nature of Olson's operation. (p. 75, Line 12 - p. 76, Line 12).

8. Gage & Tucker took approximately twenty depositions from other cattle dealers and auction barns to find out about Olson's operation. (p. 86, Line 6-22).

See Defendant Traders National Bank's Suggestions in Support of its Removal Motion for Summary Judgment at 6.

From this investigation, Gage & Tucker gathered information which indicated that Olson was engaged "in raising, fattening or grazing or other farming operations."

1. Ray Olson owned an Eight Hundred Twelve (812) acre ranch (Ex. 10, at 2);

2. Olson owned Twenty-six Thousand Two Hundred Sixty (26,260) pounds of corn (*Id.*);

3. When Harms and Caspari visited Olsons' ranch in October, 1975, there were holding pens and loading chutes on the premises (Ex. 15, at 2);

4. On February 6, 1976, Gerald Smith testified that Olson had cattle on the Herbert Bennett farm after September 1975, testimony at least partially corroborated by Bennet (Ex. 30);

5. There was on file in Sullivan County financing statements listing Ray Olson as debtor and listing "all farm machinery and equipment" and a deed of trust to secure Olson's purchases of seed, feed fertilizer and other products from MFA in Milan (Ex. 6);

6. Olson sold Four Thousand Four Hundred Sixty-Eight (4,468) head of cattle between September 1975 and January 1976 while buying some 1,100 fewer cattle in the same period.

See Reply Suggestions of General Bancshares Corporation in Support of its Motion for Summary Judgment at 8.

This court need not determine whose legal theory was erroneous or who would have prevailed under the facts as they appeared at the inception of the two suits. The court is not ruling on the ultimate *merits* of the question of whether cattle in the possession of a debtor engaged in farming operations but not actually "used or produced" in those operations would be classified in law as farm products or inventory. That issue could have been addressed in a motion for summary judgment in the prior actions, but Judge Hunter in entering the dismissal order

which ultimately spawned this lawsuit, made no such finding.[2] This court rules only the question of probable cause—whether under the facts as they reasonably appeared at the filing of the suits there was a reasonable basis to believe the claim was valid. The Uniform Commercial Code Comment which follows V.A.M.S. § 400.9-109 purports to offer guidance in the interpretation of R.S.Mo. § 400.9-109. Purpose 2 states:

> [T]he principal use to which the property is put should be considered as determinative. Goods can fall into different classes at different times; a radio is inventory in the hands of a dealer and consumer goods in the hands of a householder.

Id. at 171. Implicit in this statement is the *argument* that livestock in the hands of a farmer are farm products. In addition, Purpose 4 states unequivocally:

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2. In those cases, Traders ultimately acknowledged that facts discovered after the filing contradicted those which formed the premises of its legal theory and, therefore, that it could not sustain its burden of proof. Judge Hunter's December 16, 1977 order of summary judgment, in Case Nos. 76CV425-W-4, 76CV535-W-4, reads as follows:

> The above-captioned cases were called for hearing on Friday, December 16, 1977, at 9:00 a.m. Defendants made an oral motion for summary judgment. Plaintiff acknowledged that it had insufficient evidence to sustain its burden of proof that the cattle upon which its claims were based were "farm products" as that term is defined in Section 400.9-109(3) RSMo. 1969 and that if such cattle were not classified as 'farm products' the defendant as buyers in ordinary course of business under Section 400.9-307(1) RSMo 1969 would take the cattle free and clear of any security interest. Counsel for plaintiff admitted plaintiff had an opportunity to complete discovery under Standard Pre-Trial Order No. 1, as extended, and it was unable to obtain sufficient evidence through these proceedings.
>
> *Now, therefore,* defendants' motion for summary judgment is granted and the above-captioned actions are dismissed with prejudice for the reason that plaintiff has admitted it is unable to sustain its burden of proof on an essential element of its claim.

> Goods are 'farm products' only if they are in the possession of a debtor engaged in farming operations. Animals in a herd of livestock are covered whether they are acquired by purchase or result from natural increase. Products of crops or livestock remain farm products so long as they are in the possession of a debtor engaged in farming operations and have not been subjected to a manufacturing process. . . .
>
> When crops or livestock or their products come into the possession of a person not engaged in farming operations they cease to be 'farm products.' If they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory. . . .
>
> The line is for the court to draw.

Id. at 172. Having considered the ambiguities inherent in Missouri's version of the Uniform Commercial Code, Missouri's last antecedent doctrine, the lack of Eighth Circuit law on this issue, and Gage & Tucker's extensive pre-filing investigation indicating that Olson was engaged in farming operations, the court concludes as a matter of law that defendant Gage & Tucker had probable cause to recommend or approve the filing of the action in question and therefore that its motion for summary judgment must be granted.

The same undisputed facts which control the application of the law to Gage & Tucker's actions also govern the question with respect to defendants Guilfoil and General Bancshares. That is, plaintiffs have not alleged that Guilfoil and Bancshares had available to them any facts other than those known to Gage & Tucker. Further, plaintiffs have not demonstrated that facts material to the prob-

able cause issue are in dispute. Thus, the conclusion as to one follows as to all.

That conclusion is that as to these defendants the undisputed facts demonstrate that there was a reasonable basis to believe, at the time the lawuit was filed, that Traders had an arguable and colorable claim against the defendants then sued. That being the case, Traders lawyers or those who might have counseled with them cannot be held to answer for the possibility that they or any one of them maliciously prosecuted these plaintiffs. The summary judgment motions of defendants Guilfoil and General Bancshares must be granted.

2. *Motions of Plaintiffs and Defendant Traders National Bank of Kansas City for Summary Judgment*

There remain for disposition two more motions—one filed by plaintiffs for summary judgment against Gage & Tucker on the question of liability for malicious prosecution and the other filed by defendant Traders for summary judgment against plaintiffs. For reasons almost too obvious to warrant much discussion, both motions are overruled.

First, with respect to plaintiffs' motion against Gage & Tucker, the action previously taken in this memorandum and order makes moot any issue raised by this motion. The parties are in accord that there are no disputed facts underlying plaintiffs' claims against Traders' attorneys. The dispute is what conclusion the law demands that one draw from those facts. Because Gage & Tucker had reasonable or probable cause to recommend the filing of the original suits, it necessarily follows that plaintiffs' cross motion for summary judgment in their favor on the issue of probable cause must be denied.

The court must rule Traders' motion for summary judgment on the basis of the record as it existed before trial and not after the taking of evidence and the jury verdict. Viewing the facts presented to this court before trial in the light most favorable to the plaintiffs, the court finds that it cannot be said that undisputed facts demonstrate what Traders knew, that it told its lawyers all that it knew and then that it relied on the advice secured from these lawyers.

It is possible by hindsight, the infallibly 20/20 vision, to say now that the jury must have answered all those questions favorably to Traders. Before trial, however, it was not possible to reach that conclusion as a matter of law on the basis of undisputed evidence and therefore defendant Traders' motion must be denied.

IT IS THEREFORE ORDERED THAT:

1. The motion of defendants Gage & Tucker, John Kreamer, William Turner, Wayne Hoecker and George Coughlin for summary judgment in their favor filed September 20, 1984, is granted. Judgment for those named defendants is hereby entered and costs are assessed against plaintiffs.

2. The motion of defendant Thomas J. Guilfoil for summary judgment in his favor filed September 17, 1984, is granted. Judgment for Thomas J. Guilfoil is hereby entered and costs are assessed against plaintiffs.

3. The Motion for Summary Judgment of General Bancshares Corporation filed September 21, 1984, is granted. Judgment for General Bancshares is hereby entered and costs are assessed against plaintiffs.

4. The motions of plaintiffs for summary judgment on their claim for malicious prosecution against all defendants is denied. Judgment is entered for defendants and the costs of this motion are assessed against plaintiffs.

5. The motion of defendant Traders National Bank of Kansas City for summary judgment is denied and the costs of the motion are assessed against defendant Traders National Bank of Kansas City.

/s/ Joseph E. Stevens, Jr.
Joseph E. Stevens, Jr.
United States District Judge

December 6, 1984

APPENDIX E

400.9-109 Classification of goods—"consumer goods", "equipment", "farm products", "inventory"

Goods are

(1) "Consumer goods" if they are used or bought for use primarily for personal, family or household purposes;

(2) "Equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods;

(3) "Farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory;

(4) "Inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment. (L.1963 p. 618 § 9-109)

Missouri Code Comment

Prior Missouri statutes:

None.

Comment:

These are self-explanatory definitions for use in this article. They are new, but are important as the classification of any particular property will govern certain rights and duties under the code.

Note that the same piece of personal property will be classified as one type of goods in one situation, but of another type if used in a different situation.

A typewriter, for example, will be inventory to a dealer, equipment if used in its owner's business, but consumer goods if used by its owner for family or household purposes.

Uniform Commercial Code Comment

Prior Uniform Statutory Provision:

None.

Purposes:

1. This Section classifies goods as consumer goods, equipment, farm products and inventory. The classification is important in many situations: it is relevant, for example, in determining the rights of persons who buy from a debtor goods subject to a security interest (Section 9—307), in certain questions of priority (Section 9—312), in determining the place of filing (Section 9—401) and in working out rights after default (Part 5). Comment 5 to Section 9—102 contains an index of the special rules applicable to different classes of collateral.

2. The classes of goods are mutually exclusive; the same property cannot at the same time and as to the same person be both equipment and inventory, for example. In borderline cases—a physician's car or a farmer's jeep which might be either consumer goods or equipment—the principal use to which the property is put should be considered as determinative. Goods can fall into different classes at different times; a radio is inventory in the hands of a dealer and consumer goods in the hands of a householder.

3. The principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale. Implicit in the definition is the criterion that the prospective sale is in the ordinary course of business. Machinery used in manufacturing, for example, is equipment and not inventory even though it is the continuing policy of the enterprise to sell machinery when it becomes obsolete. Goods to be furnished under a contract of service are inventory even though the arrangement under which they are furnished is not technically a sale. When an enterprise is engaged in the business of leasing a stock of products to users (for example, the fleet of cars owned by a car rental agency), that stock is also included within the definition of "inventory". It should be noted that one class of goods which is not held for disposition to a purchaser or user is included in inventory: "Materials used or consumed in a business". Examples of this class of inventory are fuel to be used in operations, scrap metal produced in the course of manufacture, and containers to be used to package the goods. In general it may be said that goods used in a business are equipment when they are fixed assets or have, as identifiable units, a relatively long period of use; but are inventory, even though not held for sale, if they are

used up or consumed in a short period of time in the production of some end product.

4. Goods are "farm products" only if they are in the possession of a debtor engaged in farming operations. Animals in a herd of livestock are covered whether they are acquired by purchase or result from natural increase. Products of crops or livestock remain farm products so long as they are in the possession of a debtor engaged in farming operations and have not been subjected to a manufacturing process. The terms "crops", "livestock" and "farming operations" are not defined; however, it is obvious from the text that "farming operations" includes raising livestock as well as crops; similarly, since eggs are products of livestock, livestock includes fowl.

When crops or livestock or their products come into the possession of a person not engaged in farming operations they cease to be "farm products". If they come into the possession of a marketing agency for sale or distribution or of a manufacturer or processor as raw materials, they become inventory.

Products of crops or livestock, even though they remain in the possession of a person engaged in farming operations, lose their status as farm products if they are subjected to a manufacturing process. What is and what is not a manufacturing operation is not determined by this Article. At one end of the scale some processes are so closely connected with farming—such as pasteurizing milk or boiling sap to produce maple syrup or maple sugar—that they would not rank as manufacturing. On the other hand an extensive canning operation would be manufacturing. The line is one for the courts to draw. After farm products have been subjected to a manufacturing operation, they become inventory if held for sale.

Note that the buyer in ordinary course who under Section 9—307 takes free of a security interest in goods held for sale does not include one who buys farm products from a person engaged in farming operations.

5. The principal definition of equipment is a negative one: goods used in a business (including farming or a profession) which are not inventory and not farm products. Trucks, rolling stock, tools, machinery are typical. It will be noted furthermore that any goods which are not covered by one of the other definitions in this section are to be treated as equipment.

APPENDIX F

400.9-307 Protection of buyers of goods

(1) A buyer in ordinary course of business (subsection (9) of section 400.1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

(2) In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of two thousand five hundred dollars (other than fixtures, see section 400.9-313) a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes or his own farming operations unless prior to the purchase the secured party has filed a financing statement covering such goods. (L.1963 p. 626 § 9-307)

Missouri Code Comment

Prior Missouri statutes:

V.A.M.S. §§ 410.020, 428.100, 430.290, 443.460.

Comment:

(1) This section changes Missouri law in some respects. Prior V.A.M.S. § 410.020 provided that after perfection an assignment of accounts was enforceable against creditors of the assignor and *all assignees and purchasers* who have not theretofore perfected their rights. Section 428.100 stated that conditional sales were void against subsequent purchasers in good faith *if* not executed in writing, acknowledged and recorded.

Section 430.290 and cases arising under chattel mortgage provisions were in accord with this subsection.

(2) This subsection is explained in detail in the Official Comment. For practical purposes it will probably cause every secured party who has a security interest in consumer goods or farm equipment to file a financing statement even though filing is not required to perfect the interest. See V.A.M.S. § 400.9-302.

See the Official Comment for further explanation of this entire section.

Uniform Commercial Code Comment

Prior Uniform Statutory Provisions: Section 9, Uniform Conditional Sales Act; Section 9(2), Uniform Trust Receipts Act.

Changes: Policy of prior acts continued (subsection (1)).

Purposes of Changes:

This Section states when buyers of goods take free of a security interest even though perfected. A buyer who takes free of a perfected security interest of course takes free of an unperfected one. Section 9—301 should be consulted to determine what purchasers, in addition to the buyers covered in this Section, take free of an unperfected security interest.

Article 2 (Sales) states general rules on purchase of goods from a seller with defective or voidable title (Section 2—403).

2. The definition of "buyer in ordinary course of business" in Section 1—201(9) restricts the application of subsection (1) to buyers (except pawnbrokers) "from a person in the business of selling goods of that kind":

thus the subsection applies, in the terminology of this Article, primarily to inventory. Subsection (1) further excludes from its operation buyers of "farm products", defined in Section 9—109(3), from a person engaged in farming operations. The buyer in ordinary course of business is defined as one who buys "in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party." This Section provides that such a buyer takes free of a security interest, even though perfected, and although he knows the security interest exists. Reading the two provisions together, it results that the buyer takes free if he merely knows that there is a security interest which covers the goods but takes subject if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party.

The limitations which this Section imposes on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party has authorized the sale in the security agreement or otherwise, the buyer takes free without regard to the limitations of this Section. Section 9—306 states the right of a secured party to the proceeds of a sale, authorized or unauthorized.

3. Subsection (2) deals with buyers of "consumer goods" (defined in Section 9—109) and with buyers of farm equipment having an original purchase price not in excess of $2500. (If the consumer goods or farm equipment are fixtures, the rule of the subsection does not apply.) Under Section 9—302(1) (c) and (1) (d) no filing is required to perfect a purchase money interest in the consumer goods or farm equipment subject to this

subsection except motor vehicles required to be licensed; filing is required to perfect security interests in such goods or equipment other than purchase money interests and, for motor vehicles, even in the case of purchase money interests.

Under subsection (2) a buyer of consumer goods or farm equipment takes free of a security interest even though perfected a) if he buys without knowledge of the security interest, b) for value, c) for his own personal, family, or household purposes (or in the case of farm equipment for his own farming operations), and d) before a financing statement is filed.

As to purchase money security interests which are perfected without filing under Section 9—302(1) (c) and (d): A secured party may file a financing statement (although filing is not required for perfection). If he does file, all buyers take subject to the security interest. If he does not file, a buyer who meets the qualifications stated in the preceding paragraph takes free of the security interest.

As to a security interest which can be perfected only by filing under Section 9—302: This category includes all non-purchase money interests, and all interests, whether or not purchase money, in motor vehicles, as well as interests which may be and are filed, though filing was not required for perfection under Section 9—302. (Note that under Section 9—302(3) the filing provisions of this Article do not apply when a state has enacted a certain type of certificate of title law. Thus where motor vehicles are concerned, in a state having such a certificate of title law, perfection will be under that law.) So long as the security interest remains unperfected, not only the buyers described in subsection (2) but the purchasers described

in Section 9—301 will take free of the interest. After a financing statement has been filed or after compliance with the certificate of title law all subsequent buyers, under the rule of subsection (2), are subject to the security interest.

As to security interests in consumer goods or farm equipment which have become fixtures: Since the rule of subsection (2) does not apply, the normal rules govern. Section 9—313 states rules of priority between a claimant of a chattel security interest in fixtures and persons who claim an interest in the fixtures as realty.